

## **Sylla (Migration) [2018] AATA 3636 (2 August 2018)**

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### **DECISION RECORD**

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|---------------------------|------------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                     |
| <b>REVIEW APPLICANT:</b>  | Mr Mohammed Sylla                                                                                                |
| <b>VISA APPLICANTS:</b>   | Mrs Fanta Soumah<br>Mr Fode Bangaly Sylla<br>Ms Fatoumata Sylla                                                  |
| <b>CASE NUMBER:</b>       | 1621913                                                                                                          |
| <b>DIBP REFERENCE(S):</b> | BCC2015/94041 CLF2018/46172                                                                                      |
| <b>MEMBER:</b>            | Adrienne Millbank                                                                                                |
| <b>DATE:</b>              | 2 August 2018                                                                                                    |
| <b>PLACE OF DECISION:</b> | Brisbane                                                                                                         |
| <b>DECISION:</b>          | The Tribunal affirms the decision not to grant the applicants Prospective Marriage (Temporary) (Class TO) visas. |

Statement made on 02 August 2018 at 10:08am

### **CATCHWORDS**

Migration – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – Bogus documentation – Birth certificate of applicant's son – Sponsor's name change – Child's parentage – Not sponsor's biological children – History of parties' relationship Compelling circumstance – Sponsor's stress – Decision under review affirmed

### **LEGISLATION**

*Migration Act 1958* (Cth), ss 5, 65

*Migration Regulations 1994* (Cth), Schedule 2 cls 300.223, Schedule 4 PIC4020

### **CASES**

*Arora v MIBP* [2016] FCAFC 35

*Batra v MIBP* [2016] FCA 274

*Trivedi v MIBP* [2014] FCAFC 42

*Kaur v MIBP* [2017] FCAFC 184

*Plaintiff M64/2015 v MIBP* [2015] HCA 50

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 November 2016 to refuse to grant the applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
6. The applicants applied for the visas on 21 December 2014. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.300.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations). She was found not to meet Public Interest Criterion (PIC) 4020(1), because a document provided in support of the application, namely, a birth certificate purporting to be that of the parties' son, the second named applicant, was found to be bogus. The Delegate invited the applicant to respond regarding compassionate or compelling circumstances that would justify waiving the criterion but was not satisfied, on the evidence provided, that there were grounds to justify a waiver of the PIC 4020 and the granting of the visa.
7. A hearing scheduled for 13 June 2018 was cancelled when the Tribunal was unable to secure the assistance of an interpreter in the Susu (Soso) and English languages.
8. The review applicant (the sponsor) appeared before the Tribunal on 18 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant in Guinea. The Tribunal hearing was conducted with the assistance of an interpreter in the Susu (Soso) and English languages.
9. The sponsor was represented in relation to the review by his registered migration agent, who attended the hearing.
10. At the hearing the Tribunal advised the sponsor that it had information, consisting of a report of an interview by the Department with the visa applicant on 22 April 2016, that would be the reason or part of the reason for affirming the decision under review. The Tribunal advised the sponsor that the report of this interview was relevant because it contained information provided by the applicant that contradicted information that he had provided in a statutory declaration, about when and how the parties met, and about the parentage of the visa applicant's two children, the secondary applicants. The Tribunal further advised the sponsor that it had the results of the DNA tests conducted through the Department which showed that the second and third named applicants are not his biological children.
11. The sponsor was advised that the information was relevant because it could lead to a finding by the Tribunal that the applicant gave a bogus document, namely, the birth certificate of the second named applicant. The sponsor was advised that the consequences of the information being relied on would be that the Tribunal could find that the applicant did not meet PIC 4020, and affirm the decision under review. The sponsor was advised that he could seek an adjournment and consult with his representative during the hearing when questions were asked or issues raised based on the information. The sponsor did not seek an adjournment.
12. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

## **Background**

13. Information on the Departmental file indicates that the applicant was born in March 1982 in Guinea, Africa. The sponsor was born in Monrovia, Africa in 1967. According to a statutory declaration signed by the sponsor on 23 August 2014, the parties met in 2000 on the Ivory Coast, and had two children together before the sponsor left in September 2006 to join his then wife and their four children in Australia. He claimed that he had become separated from his first family during a time of communal violence, and feared they were dead until he was advised by a friend, in 2006, that they were in Australia. The sponsor's first family had resettled under Australia's offshore humanitarian program, and his wife sponsored the sponsor to join them on a Partner visa.
14. The sponsor, at hearing, claimed that he separated from his wife in 2007 or 2008. He obtained permanent residence in 2008. He obtained a divorce in July 2011; changed his name in September 2011; and obtained Australian citizenship by grant on 11 April 2013.
15. In an interview with a Departmental officer on 22 April 2016, however, the applicant is recorded as stating that the parties first met when the sponsor returned to Africa for a visit in August 2014, and the sponsor is not the father of her children. DNA tests on the applicant's children organised by the Department confirmed that they are not the biological children of the sponsor.

## **CONSIDERATION OF CLAIMS AND EVIDENCE**

16. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.300.223 for the grant of the visa. Broadly speaking, this requires that:
  - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
17. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

**Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**

18. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
19. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
20. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
21. At the time of application, the sponsor acknowledged that his name on the birth certificate is his new name, registered in Queensland on 15 September 2011, following his divorce, whereas the date of declaration on the birth certificate is 10 March 2002. At hearing, he acknowledged that the certificate contained a further error, in that his birth year is recorded as 1959 rather than 1967. He indicated that he accepted the results of the DNA test, and that the applicant's children, the second and third named applicants, are not his biological children. He argued however that the birth certificate of the second named applicant that the parties supplied is not in fact a bogus document. He argued that it had been accepted as an identity document by the boy's school; and that it was obtained from the appropriate municipal issuing authority. He provided a copy of the certificate to the Tribunal with a certifying stamp of the Matam Commune in Conakry City, for which he claimed he had paid \$50.
22. The sponsor confirmed that the document was the same document that the Department had found to be bogus. The Tribunal referred the sponsor to the Department's natural justice letter of 28 September 2016 inviting the applicant to comment on the birth certificate of her son, as it had been found to be a bogus document. The sponsor confirmed that he responded to this on 4 November 2016 by stating 'my wife and I never intended to provide any false information or documents and had we known the document was not genuine we would not have presented it'. He further stated in his response to the Department that he and his wife regretted that this had happened. At hearing however he claimed he has never conceded that the document is bogus.
23. The birth certificate in question had been verified by the Department through the Pretoria post as fraudulent. The parties did not dispute in their response to the natural justice letter, that a bogus document had been provided. The Tribunal does not accept that the same document that has been verified as fraudulent is, at the time of decision, a genuine document because a copy has been stamped with the stamp of the Matam Commune, Conakry. The Tribunal further does not accept the argument of the representative that the Department's finding that the document is bogus should not be accepted because details of the fraud, the determining authority and its processes, were not supplied by the Department. When asked whether there was any reason the Tribunal should not accept that the usual

processes and protocols for verifying documents were not followed on this occasion, the representative stated that the Department is known to have made mistakes in the past. The Tribunal does not accept this as a reason to question the validity of the verification of the document.

24. Based on the evidence discussed above, the Tribunal finds that a false or misleading statement, regarding the child's parentage, was provided by the applicant in obtaining the birth certificate of her son, the second named applicant. The Tribunal finds that the birth certificate is a document that was obtained because of a false or misleading statement, whether or not made knowingly, and is therefore a bogus document as defined in s.5(1)(c). Therefore, the applicant does not meet PIC 4020(1).

#### **Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?**

25. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
26. There is no information or evidence before the Tribunal to indicate that the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1).
27. Therefore, PIC 4020(2) does not apply.

#### **Should the requirements of PIC 4020(1) be waived?**

28. The requirements of PIC 4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirement, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
29. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
30. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
31. At the time of application, the sponsor claimed that he had four Australian citizen children, aged 16, 18, 19 and 21 who depended on him emotionally and financially. At the time of decision, the sponsor's Australian citizen children are 18, 20, 21 and 23. At hearing he acknowledged they are no longer dependent on him financially. He stated that his youngest son, who lives with his mother, has completed high school and is about to take up a house painting apprenticeship. He stated that one of his adult sons lives with him, but that this son has been working for some years, pays rent, lives his own life and uses the house as a base. For the reason that the sponsor's children in Australia are adults and not dependent on him, the Tribunal does not find the fact that the sponsor has four Australian citizen children a compassionate or compelling circumstance that justify the granting of the visa.

32. To the Tribunal the sponsor claimed that he is suffering emotional stress because he is living alone and is without the comfort and support of a wife; and financial stress because he is supporting the applicant and her children in Guinea. Evidence was provided, in the form of receipts for money transfers, that the sponsor sent funds in the order of \$100 to \$500 weekly or fortnightly, in 2016. No evidence was provided, and the Tribunal does not accept, that the sponsor has supported the applicant and her children financially since he left Guinea to join his wife in Australia in 2006. The sponsor confirmed that at the time of decision he is in full-time employment. The Tribunal does not find the financial stress suffered by the sponsor through sending funds to the applicant in Guinea around the time of lodging the Prospective Partner (Subclass 300) visa application to be a compassionate or compelling circumstance justifying the granting of the visa.
33. Regarding his claim to be suffering emotional stress, the sponsor argued, through his representative, that his relationship with the applicant is long term, as he lived with her in a de facto relationship between 2000 and 2006. The Tribunal raised the issue of the applicant's Departmental interview conducted in Ghana on 22 April 2016. As noted above, in this interview the applicant is reported as stating that the parties first met in 2014, and the sponsor is not the father of her children. According to the report of the interview, the applicant further stated: she first met the sponsor at the airport when he came back from Australia in August 2014; she knew he had children in Australia but did not know if he had been married; she did not know the sponsor went to Australia in 2006; she 'knew the man little'; her children's father is a man she was married to from 2002 to 2005 named Aleine Bangura; and she did not know that the sponsor was married to a woman from 1994 to 2011, who sponsored him to Australia.
34. At hearing, the sponsor claimed that his version of the history of the parties' relationship is correct, and the applicant had been misreported in the Departmental interview because of poor interpreting. The applicant, who gave evidence over the phone, stated that the sponsor's version of the history of their relationship was correct, and that she had been misreported because of 'wrong' interpreting during the interview. The Tribunal asked the applicant whether she had stated at the time of interview that she was experiencing difficulty with the interpreter. She responded that she had not. The Tribunal asked the applicant why her daughter, aged nine years at the time, was able to convey correct information during the interview regarding her and her brother's ages and grades at school and the sponsor's name and country of residence. The applicant repeated that the interpreter was 'wrong'.
35. The Tribunal asked the applicant how long she had lived with the sponsor. She stated that they lived together for nine months. The evidence supports and the Tribunal accepts that the parties lived together in Guinea from 11 February to 18 November 2015. The Tribunal asked the applicant how long the parties lived together before the sponsor migrated to Australia. The applicant responded that she couldn't remember. The Tribunal asked the applicant when the parties first moved in together, and when the sponsor left her and the children to join his first wife in Australia. The applicant repeated that she could not remember these things; that it was a long time ago. When asked about her first husband, she stated that it was not a legal marriage and she didn't know where he was. When the Tribunal asked the sponsor if he had met the applicant's then customary husband, he stated that he had not. He then stated that his own relationship with the applicant around the time her children were born was more in the nature of casual affair than a spousal relationship, and for this reason he was not surprised to learn that her children were not his biological children.
36. The parties' representative at hearing argued that the fact that the applicant's daughter was correctly reported answering 'simple questions' during the interview with the Department, did not preclude the interpreter being so incompetent that nearly all of the information provided by the applicant was misreported. The Tribunal finds this implausible. The Tribunal found the applicant hesitant and evasive at hearing, non-responsive to questions regarding the

sponsor's claim that they were in a relationship between 2000 and 2006, and not to be a credible witness. There is no information or evidence before the Tribunal to indicate that the interview with the applicant in Ghana on 22 April 2016 was not conducted with the usual procedural safeguards and protocols, and the Tribunal prefers the applicant's contemporaneous statements, made during the interview, regarding the history of her relationship with the sponsor.

37. The Tribunal does not find that the parties were in a long term de facto relationship between 2000 and 2006. The Tribunal for this reason does not find the sponsor's stress because of their separation to be a compelling circumstance justifying the granting of the visa. The Tribunal accepts that the sponsor lived with the applicant for nine months in 2015, and that he wants her to live with him in Australia, but does not find this compelling.
38. Having considered the evidence and arguments, the Tribunal is not satisfied that in this case there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa.
39. Therefore, the requirements of PIC 4020(1) should not be waived.
40. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.300.223.
41. The circumstances of the applicant are not relevant to, and she has made no claim to meet the criteria for any other subclass within the class of visa sought.

## **DECISION**

42. The Tribunal affirms the decision not to grant the applicants Prospective Marriage (Temporary) (Class TO) visas.

Adrienne Millbank  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...



## ***Migration Act 1958***

### **s.5 Interpretation**

(1) In this Act, unless contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...